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In The Supreme Court of the United States

October Term, 1995

Southern Pacific Transportation Company,
Petitioner,

v.

Mary E. Isbell, Dennis Isbell, David Isbell, John Isbell, Marsha Isbell, Joseph Isbell, The State of Arizona, Maricopa County, The City of Chandler, and The Maricopa County Superior Court,
Respondents.

On Petition for a Writ of Certiorari to the Arizona Supreme Court

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PETITIONER'S REPLY BRIEF

F. Pendleton Gaines, III
Counsel of Record
Mark H. Brain
Fennemore Craig, P.C.
Two North Central Avenue
Suite 2200
Phoenix, Arizona 85004
(602) 257-8700
Counsel for Petitioner

October 6, 1995

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Petitioner,

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MARY E. ISBELL, DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL, JOSEPH ISBELL, THE STATE OF ARIZONA, MARICOPA COUNTY, THE CITY OF CHANDLER, and THE MARICOPA COUNTY SUPERIOR COURT,
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PETITIONER'S REPLY BRIEF

Pursuant to Rule 15.6, Southern Pacific Transportation Company ("Southern Pacific") respectfully files this brief reply in support of its petition for a writ of certiorari to review the opinion of the Arizona Supreme Court.[1]

Although the majority of the arguments set forth by Isbell in the brief in opposition to the petition for a writ

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[1] The Rule 29.1 Statement contained in the Petition remains correct.

of certiorari are refuted by Southern Pacific's petition, and are therefore inappropriate to address through this reply under Rule 15.6, the following points were not directly raised in the petition, and therefore need to be addressed.

1. Isbell's suggestion that § 409 does not protect information generated after an order regarding improvements has been entered (Brief in Opposition at 14-15) is incorrect. In addition to protecting information gathered to plan safety enhancements, § 409 specifically protects information used in "evaluating" grade crossings and in "identifying" hazards, both of which frequently require a retrospective analysis. The Arizona Corporation Commission can and does evaluate a crossing after an improvement to determine whether the improvements are having the desired effect or whether even greater improvements are necessary, and whether similar improvements may be worthwhile at other sites or whether its limited funds would best be spent in a different manner.

Moreover, § 409 explicitly protects data gathered pursuant to 23 U.S.C. §§ 130(d) and 152(a). Section 130 (d) requires the states to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and implement a schedule of projects for this purpose." Similarly, § 152(a) declares:

> Each state shall *conduct and systematically maintain an engineering survey* of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement. (Emphasis added.)

Neither of these statutes suggests a distinction between information gathered before and after an order authoriz-

ing improvements is entered for purposes of § 409, and none exists.

Finally, Isbell's proposed distinction ignores Congress' purpose in enacting § 409. Courts uniformly hold that § 409's purpose is to promote the public safety and to encourage candor by protecting safety-related information gathered in connection with public highways, including railroad crossings. Drawing a distinction between information received before and after an order authorizing improvements finds no support in the statute or the case law.

2. This case is ripe for review, and should be reviewed. It is true that the Arizona Supreme Court refused to evaluate any of the specific discovery requests at issue. That court did, however, issue an opinion which is demonstrably incorrect, and the lower courts in Arizona will have no choice but to order the production of protected information in accordance with that opinion. For example, Isbell admits that she seeks to discover "factual observations made by persons involved in the review process." Brief in Opposition at 9. Under any rational reading of § 409, those observations constitute data compiled for safety purposes, and therefore are protected by § 409, even though the Arizona Supreme Court's opinion incorrectly restricts § 409's protection to documents.

It is not sufficient to leave these issues for another day, nor to say that they can be properly addressed after the trial. Through the 1991 amendment to § 409, Congress expressly shielded information connected with its safety program from discovery. That safety program covers all roadway hazards, not merely grade crossing hazards. Congress' purpose in enacting § 409 is to facilitate candor in its safety program and prevent private litigants from taking advantage of federally required record-keeping. Petition at 6. The Arizona Supreme Court's decision casts a pall over Congress' safety program, both inside and outside of Arizona.

CONCLUSION

Broad public interests are at stake. The scope of § 409 is an issue that recurs on a regular basis (indeed, *State of Louisiana v. Poole*, No. 95-172, October Term 1995, involved an unreported decision on the scope of § 409), and the Arizona Supreme Court's published opinion is plainly wrong and will thwart Congress' purposes if left uncorrected. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

F. PENDLETON GAINES, III
Counsel of Record
MARK H. BRAIN
FENNEMORE CRAIG, P.C.
Two North Central Avenue
Suite 2200
Phoenix, Arizona 85004
(602) 257-8700
Counsel for Petitioner

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